petition was originally fixed. The respondent's profits for 1993, although a good sign considering their earlier losses, was only a modest RM97,557 which would cover only three monthly payments at the rate proposed by them. Any possibility of a better margin in their future profits is highly speculative in the circumstances. At the amount proposed by the respondent, payment would take at least thirteen years. In addition, they also owe the government and PAS another RM1.8 million.

To my mind, the respondent has no assets to meet its current liabilities and therefore is commercially insolvent. It is more than obvious that they are unable to pay their debts especially considering the fact that the judgment against them was granted almost eight years ago. Although winding-up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate, I find none here. I had accordingly granted the petition as prayed.

WILLIE SODOI

v.

PUBLIC PROSECUTOR

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. T 14 OF 1994]
5 JULY 1994

CRIMINAL PROCEDURE: Charge - Section 380 Penal Code - Element of time - Time of commission of offence not disclosed by evidence - Whether charge proved - Whether conviction proper - CPC s. 153(i).

The appellant was convicted of an offence under s. 380 Penal Code for theft of 130 bags of cocoa beans sometime "dalam bulan Februari 1991 di antara jam 1.00 petang dan 2.00 petang". The facts showed that despite the prosecution having seemed to have proved the other ingredients of the charge, it failed to adduce any evidence at all to show just when approximately the alleged offence was committed let alone the actual time of the commission of the offence as specified in the charge. On appeal the question that arose was whether in the circumstances the appellant was properly convicted by the lower Court.

Held:

[1] Since a charge requires the date of the alleged commission of the offence to be stated, the evidence that go towards supporting the charge should likewise establish the approximate date in which the offence was committed. In this case the time in which the offence was alleged to have been committed was not proven at all let alone establishing a reasonable proximate period. The evidence tendered by the prosecution are not specific and accurate enough as to even require the accused to enter upon his defence.

[Conviction set aside. Accused acquitted and discharged].

Cases referred to:
Re Lim Yong Eng [1956] MLJ 79
R. v. Hartley [1972] 2 QB 1, CA

Legislation referred to:
Criminal Procedure Code, s. 153(i)

For the accused - C.C. Liew; M/s. C.C. Liew & Co.
For the public prosecutor - Zahir Hussein B. Ahmad Shah, DPP

JUDGMENT

Ian H.C. Chin J:

This is an appeal by Willie Sodoi ("the accused") who was on the 24 February 1994 convicted of the following charge of theft, viz:

> Bahawa kamu bersama-sama dengan 3 orang rakan kamu, dalam bulan Februari, 1991 di antara jam 1.00 petang hingga 2.00 petang, di Gudang Sasco Sdn. Bhd., Jalan Kastam Baru, Lahad Datu, dalam Daerah Lahad Datu, di dalam Negeri Sabah, telah mencuri sejumlah 130 karung koko kering daripada gudang tersebut yang benilai lebih kurang RM30,000 kepunyaan Sasco Sdn. Bhd. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 380 Kanun Kesiksaan.

The main evidence against the accused came from three inmates of the Tawau prison who were serving sentences in respect of the theft of cocoa beans. Their evidence are as follows.

Ramli bin Sulaiman testified on the 14 December 1992 and he said he was serving a sentence of 18 months passed by the Court in 1991 for stealing cocoa beans from the godown of Sasco Sdn. Bhd, Jalan Kastam Baru, Lahad Datu. On an unspecified time (the time, date, month and year were not stated), he saw bags of cocoa beans in an unlocked godown of Sasco Sdn. Bhd. and there was no one inside the godown. He thereafter looked for and found his friend, one Linus Loboh, for the purpose of stealing the cocoa beans from the said godown. He got hold of the accused who had a lorry and the three of them then went in the lorry of the accused to the godown. They helped themselves to 80 bags of cocoa beans from the said godown which the three of them carried to the lorry of the accused. The accused thereafter went on his own to dispose of the cocoa beans. The three later met up and the accused gave Ramli bin Sulaiman and Linus Loboh each RM800 being their shares of the loot.

Another prison inmate who testified was the said Linus Loboh. He started his evidence by saying that he was jailed in 1992 for stealing cocoa beans from Sasco Sdn. Bhd. Jalan Kastam Baru, Lahad Datu. To appreciate what quality of evidence were laid before the Court by this witness, it is best to reproduce his evidence *verbatim*, *viz*:

> Sekarang saya tinggal di penjara Tawau sebab saya curi koko. Saya sudah dijatuhi hukuman selama 18 bulan penjara. Saya dijatuhi hukuman pada tahun 1992 (tahun ini) bulan Februari. Saya curi koko di Sasco, Jalan Kastam Baru Lahad Datu.
>
> Mula-mula Ramli bawa sama saya. Ramli tu Ramli Sulaiman. Dia kerja di Otentik. Ramli jumpa saya di hadapan pondok polis di Pekan Lahad Datu. Dia bilang "itu pintu Sasco sana terbuka, kalau mau kita pigi curi". Saya pun maulah. Ada satu orang lagi. Namanya Willie Sodoi. Ada dia di sini. PW2 - Accused identified.
>
> Lepas itu kami pergi Gudang Sasco menaiki kereta Willie Sodoi. Kereta Willie itu ialah lori, Wlllie yang bawa lori. Tidak ingat nombor dan warna lori tersebut.
>
> (Sampai Gudang Sasco). Lepas itu kami ambil koko. Biji koko disimpan dalam karung. Pintu gudang tidak kunci sebab memang sudah rosak. itu karung kami muat atas lori. 3 orang kani angkat dalam lori. Saya tidak ingat berapa karung kami muat.
>
> Lepas itu saya dan Ramli turun pergi ke Bandar menaiki bas. Willie yeng bawa lori dan koko. Saya tidak tahu dia bawa pergi mana. Dia mahu jual itu koko. Lepas muat koko, saya jalan dulu turun pekan. Saya tidak tahu Ramli pergi mana. Saya turun pekan untuk tunggu Willie Sodoi. Willie beritahu lepas dia jual koko dia akan kasi duit sama kami. Dia suruh tunggu di dewan masyarakat. Ya, saya ada tunggu sama dia. Ya, Willie ada datang. Ramli pun ada pergi ke dewan
>
> Bila Willie, saya dan Ramli ada di Dewan, Willie bagi saya RM800. Saya tidak nampak Willie bagi duit sama Ramli. Lepes itu kami pergi jalan-jalan. Selepas itu saya ada jumpa Willie lagi iaitu 2 hari kemudian. Saya jumpa dia dekat panggung wayang di belakang pondok polis. Saya tanya Willie, "itu pintu Sasco masih bukakkah ? Dia bilang pergi tengoklah. Lepas itu saya, Willie dan Petrus pergi tengok di Gudang. Petrus adalah Petrus Kopong. PW2 Petrus Kpong identified.
>
> Saya jumpa Petrus di panggung wayang, masa itu dia mau tengok wayang. Bila mau pergi tengok gudang saya panggil Petrus ikut. Bila sampai sana, pintu gudang tarbuka. Masa itu tiada perkarja di sana. Masa itu cuti (tapi bukan hari minggu).
>
> Kali kedua pergi sana, kami pergi pakai lori Wilie Sodoi juga. Sampai sana, pintu terbuka, kami ambil koko. 3 orang ambil koko. Saya tidak kira berapa banyak (karung) kami ambil. Kali kedua kami ambil tu kurang dari pertama kami ambil. Lepas itu saya sama Petrus ikut bas pergi bandar. Willie bawa koko pergi jual. Saya tidak tahu di mana dia jual.

Kami tunggu Willie dekat panggung wayang untuk kasi duit jual koko yang kami ambil di Gudang Sasco. Willie ada datang sana. Dia kasi RM350. Saya ada nampak Willie kasi Petrus RM350.

Lepas itu kami jalan-jalan. Ya, saya ditangkap oleh polis atas kes ini. Ada, saya didakwa di Mahkamah untuk kes ini. 18 bulam penjara saya jalani untuk kes curi koko di Gudang Sasco ini.

Ya, saya tahu bila saya, Ramli, Petrus dan Willie pergi ambil koko itu, kami mencuri koko itu. Ya, si Willie tahu kami mencuri koko itu. Ya, saya ada baritahu dia kami pergi mencuri koko.

The last criminal to testify was Petrus Kopong and for the purpose of gauging the quality of his evidence, it is also reproduced *verbatim*, *viz*:

Saya sekarang tinggal di penjara Tawau kerana curi koko. Saya sudah dijatuhi hukuman selama 18 bulan. Saya curi koko di Gudang Sasco, Jalan Kastam Lama. Saya curi koko sama Willie dan Linus. Linus panggil saya untuk angkat koko. Dia jumpa saya di bandar, Billiard dekat pondok polis. Ya, saya ikut. Willie ikut. Willie ada di Mahkamah. PW3 Accused identified.

Lepas itu pergi Gudang Sasco pakai Willie punya pick-up - $3^1/_2$ tan. Sampai di Gudang ambil koko muat dalam lori. Saya Linus dan Willie. Lepas itu, Willie bawa itu lori. Kami naik (sama Linus) bas pergi bandar. Sampai di bandar, kami tunggu dia di dewan sebab si Willie bawa duit harga koko. Kami tidak tahu di mana dia jual itu koko.

Ya, Willie ada jumpa kami. Dia kasi duit RM350. Linus ada masa itu. Saya nampak Linus terima RM350 juga. Saya lupa bila. Ya, saya tahu kami pergi mencuri. Saya tidak ingat hari apa. Tiada orang lain lagi di situ.

Those were the principal evidence against the accused regarding the theft of 130 bags of cocoa beans. Two staff of Sasco Sdn. Bhd. testified with one stating that that in 1991 she did a count of the cocoa beans and, according to her, 136.71695 tons were missing and that there should be 16 bags to 1 ton. She reported to her manager the loss. The other, who was the said manager, stated that it was reported to him that there was a loss of 2,188 bags of cocoa beans for which he lodged a police report on the 19 October 1991. Those were all the evidence against the accused at the close of the case for the prosecution. The question is, are they enough to establish a *prima facie* case? The evidence do not establish the year, month or date the offence was committed even though the charge alleges that the offence was committed in February 1991. It is laid down by s. 153.(i) of the Criminal Procedure Code that a charge should contain particulars as to time, place and person, viz:

> The charge shall contain such particubrs as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

Therefore, a charge should at least state the time the offence was alleged to have been committed. In this case, the charge alleges the offence to have been committed sometime in February 1991 which I think is reasonably sufficient notice of the matter charged. See *Re Lim Yong Eng* [1956] MW 79. Since a charge requires the date of the alleged commission of the offence to be stated, the evidence that go towards supporting the charge should likewise establish the approximate date in which the offence was committed. The evidence in this case failed to do so. They are not specific and accurate enough as to require the accused to enter upon his defence. How could anyone answer an allegation that he had on an unknown date stolen cocoa beans. I am inclined to agree with the observation of the Court in *R. v. Hartley* [1972] 2 QB 1, C.A. where it is said that where the words "on or about [the date] are used", to render a verdict of guilty lawful the offence must be shown to have been committed "within some period which has a reasonable proximation to the date mentioned in the indictment." In the present case, the time in which the offence was alleged to have been committed was not proven at all let alone establishing a reasonable proximate period. I therefore, on 4 July 1994, set aside the sentence and conviction of the accused and discharged and acquitted him.